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No. 83-469

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,
Petitioner,

v.

BILLY G. YOUNG,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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October, 1983

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QUESTION PRESENTED

Did the Court of Appeals err in reversing and remanding the case for new trial on the ground that the prosecuting attorney's statements of his personal belief in respondent's guilt constituted prosecutorial misconduct?

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

Billy G. Young was charged by indictment with willfully and knowingly devising a scheme and artifice to defraud APCO Oil Corporation and to obtain money and property by false and fraudulent pretenses. Young's defense was that he was totally without fraudulent intent. His evidence stood for the proposition that his actions were done in good faith and without the requisite *mens rea* to support a criminal conviction. The government witnesses who were personally acquainted with Billy Young testified to his outstanding honesty and integrity (Tr. 57, 115, 331, 359).

The jury returned a verdict of guilty against Billy Young because of prejudicial misconduct in the closing rebuttal argument by the prosecuting attorney. The prosecuting attorney's argument was outrageously improper. He told the jury he personally believed in Young's guilt, and stated that it was the duty of the jurors to find Young guilty.

The Court of Appeals held the prosecutor's statements constituted prosecutorial misconduct and were so egregious as to constitute plain error. The case was reversed and remanded for new trial.

The Government takes liberties with the record in the portion of its petition entitled "Statement." Such "Statement" contains flat misstatements of the record. The Government's lengthy recital of its version of the trial is not material to the issue presented. Therefore, a detailed rebuttal will not be set forth.

ARGUMENT

The petition is without merit. The petitioner has not advanced or suggested any valid basis for this Court to grant a review on writ of certiorari. The considerations governing review on certiorari as set forth in this Court's Rule 17 are not met. This case involves nothing more than a single prosecutor running amuck. There is no conflict with any other circuit. There is no constitutional question involved. The decision merely holds that the respondent was denied a fair trial because of prosecutorial misconduct. Set out below are examples of the prosecutor's expressions of his personal belief in respondent's guilt which virtually

forced an intimidated jury to return a verdict of guilty against Billy Young:

> "I think he said that not anyone sitting at this table thinks that Mr. Young intended to defraud Apco. Well, I was sitting there and I think he was. I think he got $.85 a barrel for every one of those 117,250.91 barrels he hauled and every bit of the money they made on that he got one percent of. So, I think he did. If we are allowed to give our personal impressions since it was asked of me.
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> * * *
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> "I don't know what you call that, I call it fraud.
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> "You can look at the evidence and you can remember the testimony, you remember what they said and what he admitted they said, I think it's a fraud.
>
> * * *
>
> "He said — Mr. Bailey said Apco didn't lose, says doesn't think anyone will come back. Well, what he thinks they won't come back but my experience in these matters is when the government does something like this they are going to come back. All that money that Apco got for this stripper and new oil, Al Greene at the Apco trust he's going to get some kind of invoices. That's what I think.
>
> * * *
>
> "Well, Mr. Bailey said that Mr. Young acted with honor and integrity in this case, he was the only one that did it. Well, he got all of his friends at Compton involved in this thing and he told his friends at Apco, Hugh Bradley, Don Heavin, said, no, I'm not selling you fuel oil. I don't know whether you call it honor and integrity, I don't call it that, Mr. Bailey does. If you feel you should acquit him for that it's your pleasure. I don't think you're doing your job as jurors in finding facts as opposed to the law that

this judge is going to instruct you, you think that's honor and integrity then stand up here in an Oklahoma courtroom and say that's honor and integrity; I don't believe it." (Tr. 549-552).

The Tenth Circuit Court of Appeals had this to say about the prosecutor's statements:

> "These portions of the transcript speak for themselves. The prosecutor repeatedly stated his opinion regarding the appellant's intent to defraud, the likelihood of future prosecutorial action against one other party involved in the scheme, and the duty of the jurors to find the appellant guilty. The issue has come before this court enough times in recent years to establish beyond cavil that such statements constitute prosecutorial misconduct. *United States* v. *Rios*, 611 F.2d 1335 (10 Cir. 1979); *United States* v. *Latimer*, 511 F.2d 498 (10 Cir. 1975); *United States* v. *Coppola*, 479 F.2d 1153 (10 Cir. 1973); *United States* v. *Ludwig*, 508 F.2d 140 (10 Cir. 1974)." Pet. App. A, p. 10a.

The Court of Appeals went on to state:

> "Considering the position of this court on the issue of prejudicial statements made by the prosecution during argument to the jury, the above-quoted remarks were sufficiently egregious as to constitute plain error." Pet. App. A, p. 10a.

Improper conduct of this type by the prosecutor puts defense counsel in an untenable position before the jury. In this case, from opening statement through closing argument, defense counsel had commented on the prosecutor's unfair and incorrect characterization of the evidence. Objections directed to a point that has already been so heavily emphasized can be counter-productive and can bring about the very result they are designed to prevent. That

is one of the reasons for the plain error rule. In short, at the point of the prosecutor's closing rebuttal argument, defense counsel is in a no-win situation; if objection is overruled, it undercuts the entire protest defense counsel has previously made, and if sustained, the damage has been done and defense counsel is made to appear as protesting too much. The only remedy for such clear abuse is insistence upon lawful and ethical prosecutorial behavior, enforced by the plain error rule. These points were emphasized many years ago by this Court in *Berger* v. *United States*, 295 U.S. 78, 79 L.Ed. 1314 (1935). The matter can hardly be put more clearly than it was in that case:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.
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> • • •
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> "It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.
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> • • •
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> "In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence." 295 U.S. at 88, 89.

It is inconceivable that this Court would sanction the prosecuting attorney's behavior in this case. It is almost

as inconceivable that the Government would argue, as it does, that the Tenth Circuit decision is "contrary" to *Lawn* v. *United States*, 355 U.S. 339 (1958). (The Government states, "The court of appeals did not cite *Lawn*, but simply followed contrary Tenth Circuit precedent." Pet. p.15 n.15).

The Tenth Circuit's opinion is not contrary to *Lawn*. Further, the issue in this case is not related to the issue in *Lawn*. The Government's reliance on *Lawn* is based on a footnote which quotes the Government's attorney as saying in closing summation, "We vouch for [Roth and Lubben] because we think they are telling the truth." The footnote goes on to say, "The Government's attorney did not say nor insinuate that the statement was based on personal knowledge or on anything other than the testimony of those witnesses given before jury, and therefore it was not improper." Further, the footnote recites that there were corrective jury instructions.

Vouching for a witness has nothing to do with this case. If all the prosecutor had done here was vouch for a witness, the jury would not have convicted Billy Young. The comment in *Lawn* didn't remotely approach the situation here; i.e., the prosecutor's repeated statements of his personal belief in respondent's guilt. Nor was there any statement by the *Lawn* prosecutor that it was the duty of the jurors to convict.

The prosecutor's expressions of his personal belief in respondent's guilt were not only inherently reprehensible in and of themselves, but they were forcibly directed to the destruction of his good faith defense. They denied Billy Young a fair trial.

CONCLUSION

The decision of the Court of Appeals is predicated on well-established doctrine under a set of facts peculiar to this case. The petition presents no issue warranting review by this Court. It should be denied.

Respectfully submitted,

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October, 1983

CERTIFICATE OF SERVICE

I hereby certify that the following named persons, required by law to be served in this case, were this day mailed three (3) copies of the foregoing Brief in Opposition, postage prepaid.

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